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No. 1307

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

EDWARD M. HELIGMAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Edward M. Heligman, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on March 5, 1969.

OPINIONS BELOW.

This cause was decided by a panel of the United States Court of Appeals on March 5, 1969, in an opinion (R. II 1-8)* which has not yet been officially reported. Ex-

* The certified transcript of the record filed by the Clerk of the United States Court of Appeals for the Eighth Circuit consists of two volumes. References to the Record (R.) in this petition shall be to the volume (in Roman numeral) and the page (in Arabic numeral).

cerpts of the opinion are reported at 4 Cr. L. 2519. The opinion is reproduced as Appendix A hereto.

An order was entered by District Judge Regan on March 1, 1968, overruling petitioner's motion to dismiss the indictment (R. I 12-13), but no opinion was written. Judge Regan did not write an opinion when he found petitioner guilty on March 8, 1968.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on March 5, 1969 (R. II 9). See Appendix B. A timely petition for rehearing *en banc* or, in the alternative, for a rehearing (R. II 10-15) was denied on March 26, 1969, by the Court *en banc* (R. II 16; See Appendix C), and on March 27, 1969, by the Court (R. II 17; See Appendix D).

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1), and Rule 37 (c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

I.

Whether, under the Fifth Amendment to the Constitution of the United States, as interpreted by **Albertson v. Subversive Activities Control Board**, 382 U. S. 70; **Marchetti v. United States**, 390 U. S. 39; **Grosso v. United States**, 390 U. S. 62, and **Haynes v. United States**, 390 U. S. 85, petitioner was excused from the statutory obligation to file corporate income tax returns in behalf of a corporation of which he was president, where, by so doing, petitioner might have incriminated himself with respect to potential or pending criminal charges involving violations of the Interstate Commerce Act.

II.

If **United States v. Sullivan**, 274 U. S. 259, is applicable to this case, whether that decision should be reexamined in the light of **Albertson, Marchetti, Grosso**, and **Haynes.**

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Fifth Amendment to Constitution of the United States:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

Statutes of the United States:

> 26 U. S. Code, § 6012. **Persons required to make returns of income.**
>
> (a) **General Rule.**—Returns with respect to income taxes under subtitle A shall be made by the following: . . .
>
> (2) Every corporation subject to taxation under subtitle A; . . .
>
> 26 U. S. Code, § 6062. **Signing of corporation returns.**
>
> The return of a corporation with respect to income shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act. . . . The fact that an individual's name is signed on the return shall be prima facie evidence that such individual is authorized to sign the return on behalf of the corporation.
>
> 26 U. S. Code, § 7203. **Willful failure to file return, supply information, or pay tax.**
>
> Any person . . . required by this title or by regulations made under authority thereof to make a

return . . ., keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or suppy such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT.

Petitioner was convicted on a two-count indictment (R. I 1-2) charging him with violations of Section 7203 of the Internal Revenue Code, 26 U. S. C., § 7203, in that as president of E & H Leasing Company, a corporation, petitioner willfully failed to make an income tax return for the corporation. Count I related to the calendar year 1961 and Count II to the year 1962, for which the returns were due on or before March 15, 1962, and March 15, 1963, respectively.

After pleading not guilty, petitioner filed a motion to dismiss both Counts of the indictment (R. I 12) on the grounds that if he had filed the returns, he would have incriminated himself, and that Section 7203 violated the Fifth Amendment to the Constitution of the United States insofar as it required him to make the returns. In connection with the motion to dismiss, petitioner and the Government stipulated (R. I 16) that on March 18, 1963, petitioner had pleaded guilty to thirty counts of a sixty-five count criminal information (R. I 37-83) charging violations of the Interstate Commerce Act, for which he was fined $15,000.00. The stipulation also incorporated certain Findings of Fact and Conclusions of Law (R. I 17-31) and a Consent Judgment (R. I 32-36) in a civil proceeding brought by the Interstate Commerce Commission against petitioner and others. Both of these pro-

ceedings were conducted before the same Federal District Judge who heard the instant case.

Each of the sixty-five counts in the criminal information, filed on December 4, 1962, alleged that petitioner aided and abetted a corporate interstate commerce violation by transportation without an ICC certificate or permit. The dates of the alleged offense were between October 3, 1960, and April 13, 1962. Of the sixty-five counts, five related to dates in the year 1960, forty-three in 1961, and seventeen in 1962. Of the thirty counts to which petitioner pleaded guilty, five were in 1960, fifteen in 1961, and ten in 1962.

The civil proceeding was filed on April 18, 1963. The Findings of Fact and Conclusions of Law and the Consent Judgment outlined the participation of petitioner and several corporations with which he was associated in numerous violations of the Interstate Commerce Act. It also detailed the various criminal prosecutions in which petitioner had been involved over many years.

Petitioner's motion to dismiss was argued and overruled on March 1, 1968 (R. I 12-13). Thereafter, petitioner and the Government entered into a stipulation (R. I 85-86) in which petitioner in effect admitted the facts essential to prove the Government's case (The purpose of this stipulation was to avoid a trial but to preserve the Fifth Amendment issue for appeal).

On March 8, 1968, the District Court without a jury found petitioner guilty on each count of the indictment. On March 22, 1968, petitioner was sentenced to a term of imprisonment for one year on each count, the sentences to run concurrently (R. I 87). Petitioner thereafter duly filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit (R. I 88).

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals on March 5, 1969

(R. II 9—Appendix B) affirming petitioner's conviction, in an opinion written by Circuit Judge Gibson and concurred in by Circuit Judges Matthes and Lay (R. II 1-8—Appendix A).

REASONS FOR GRANTING THE WRIT.

The two-count indictment (R. I 1-2) charged that petitioner, as president of E & H Leasing Company, a corporation, failed to file corporate income tax returns for the years 1961 and 1962, due respectively on or before March 15, 1962 and March 15, 1963. The willful failure to file such a return is a misdemeanor under Section 7203 of the Internal Revenue Code, 26 U. S. C., § 7203. Petitioner has not disputed that the corporation was required to file a return (26 U. S. C., § 6012) nor that as president he was a person charged with the duty of signing such return (26 U. S. C., § 6062).

Petitioner's position, however, and the sole issue in the trial Court and in this petition, is that, under the special circumstances of this case, the requirement of § 7203 that petitioner make and sign said return constituted, as to him, a violation of the rights guaranteed under the Fifth Amendment to the Constitution of the United States: "No person . . . shall be compelled in any criminal case to be a witness against himself." Because of the special circumstances of this case, petitioner would have incriminated himself, contrary to the doctrine of **Albertson v. Subversive Activities Control Board**, 382 U. S. 70, and as further enunciated by this Court in **Marchetti v. United States**, 390 U. S. 39, **Grosso v. United States**, 390 U. S. 62, and **Haynes v. United States**, 390 U. S. 85.

The facts are not in dispute. A stipulation (R. I 16-83) filed in the trial Court in connection with petitioner's motion to dismiss the indictment (R. I 12-13) revealed that on December 4, 1962, a criminal information was filed

against petitioner charging him with sixty-five violations of the Interstate Commerce Act, committed between October 3, 1960, and April 13, 1962 (R. I 37-83). These consisted of five violations in the year 1960, 43 violations in 1961, and 17 violations in 1962. On March 18, 1963, petitioner pleaded guilty to 30 of these counts (five violations for 1960, 15 for 1961 and 10 for 1962).

The dates of these violations are highly significant, for the indictment herein charged petitioner with failing to file the corporate tax returns for two of these years—1961 and 1962. Count 59 (R. I 76), to which petitioner pleaded guilty, charged an offense on March 13, 1962; two days later, according to the indictment herein, petitioner was required to file a corporate tax return and to sign it in his official capacity. Count II of the indictment herein charged that petitioner was required to file a corporate tax return on or before March 15, 1963; on that very date the 65-count criminal information was pending and was not disposed of until three days later when petitioner pleaded guilty to 30 of the counts and was thereafter fined $15,000.00. From these facts, it is obvious that the filing of the corporate tax return could have incriminated petitioner. When the corporate tax returns were required to be filed, petitioner was either committing violations of the law or already in criminal court with undisposed charges for violations of the law.

The jeopardy to which petitioner was personally subject is further revealed by the civil proceeding filed by the Interstate Commerce Commission on April 18, 1963. (See paragraph 2 of Stipulation on Motion to Dismiss (R. I 16).) From the Findings of Fact and Conclusions of Law (R. I 17-31) and the Consent Judgment (R. I 32-36) entered therein, it is obvious that petitioner was, during the years 1961 and 1962 and for a long time prior thereto, engaged in numerous illegal activities in behalf of the E & H Leasing Company as well as other companies

which he controlled and operated. It is readily apparent that his entire course of conduct was illegal, for which he and his companies were subjected to substantial penalties throughout the years. Note that in 1958 and 1960, prior to the tax years here involved, petitioner had already been fined personally on two occasions for criminal violations of knowingly and willfully aiding and abetting violations in interstate commerce, the latter involving the E & H Leasing Company also (R. I 27).

If petitioner had prepared and filed the corporate tax returns as commanded by the statute, he would necessarily have been required to sign them in his official corporate capacity. Corporate tax return forms bear a line for signature of an officer with a statement of his official title. The 65-count information alleged in each count that petitioner, an individual, knew that the corporation was violating the law and that he knowingly and willfully aided and abetted the corporate offense. What better evidence of his knowledge and intent would the Government need than that petitioner signed a corporate tax return as its president. For petitioner to have filed the corporate tax returns certainly would have tended to incriminate him. It would have furnished "a link in the chain of evidence needed to prosecute the (petitioner) for a federal crime." With the background of interstate commerce violations, petitioner had "reasonable cause to apprehend danger from a direct answer. . . . (I)njurious disclosure could result." **Hoffman v. United States**, 341 U. S. 479, 486-487. See also **Marchetti v. United States**, 390 U. S. 39, 48.*

* The Court below stated: "The privilege must be specifically claimed on a particular question and the matter submitted to the court for its determination as to the validity of the claim." But here there was no court proceeding, prior to the criminal prosecution, in which petitioner could have asserted his Fifth Amendment privilege. Even in **Daly v. United States**, 8 Cir., 393 F. 2d 873, cited in the opinion below, there was a non-criminal proceeding available to test the propriety of its assertion. Petitioner raised the Fifth Amendment privilege at the earliest pos-

We believe the instant case is governed by **Albertson v. Subversive Activities Control Board,** 382 U. S. 70. An analogy exists because, in effect, what was required of petitioner here was a registration. No tax was imposed on petitioner, as was the situation in **United States v. Sullivan,** 274 U. S. 259. Any tax here was required of the corporation, not of petitioner personally. His only obligation was to "register" the corporation by filing the return for it, as in **Albertson.** Even if the broad language of **Sullivan** had not been limited by **Albertson, Marchetti, Grosso,** and **Haynes,** it would not be applicable here because Sullivan was himself the taxpayer and himself required to pay the tax, whereas here petitioner is neither the taxpayer nor the entity required to pay the tax.

In **Albertson** individuals were required by law to file a registration in behalf of the Communist Party. To have done so would have caused them to incriminate themselves as Communist individuals; failing to do so subjected them to heavy penalties. Here petitioner was required by law to file a tax return (a registration) in behalf of the E & H Leasing Company. To have done so would have caused him to incriminate himself as a violator of the Interstate Commerce Act; failing to do so subjected him to a term of imprisonment for one year in this proceeding.*

In the ICC civil and criminal proceedings against petitioner, he could not have been required to testify as to his corporate capacity. As said in **Albertson,** 382 U. S. at

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sible time in a court proceeding (cf. **Marchetti,** at 50-51), and just as in **Daly,** he should have been afforded a forum to test the propriety of his claimed privilege without the immediate jeopardy of a jail sentence.

* Petitioner had "a choice between the rock and the whirlpool." **Garrity v. New Jersey,** 385 U. S. 493, 496. He should not "be denied the protection of the Fifth Amendment privilege intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so." **Albertson,** 382 U. S. at 76.

78: ". . . but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." The information in the corporate return showing petitioner's office as president "might be used as evidence in or at least supply investigatory leads to a criminal prosecution." 382 U. S. at 78. See also **Marchetti v. United States**, 390 U. S. 39, 47-48.

The doctrine of Albertson was reiterated by this Court in **Marchetti v. United States**, 390 U. S. 39; **Grosso v. United States**, 390 U. S. 62, and **Haynes v. United States**, 390 U. S. 85. As said in **Marchetti** (l. c. 53):

> "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary hazards of incrimination. **Rogers v. United States**, 340 U. S. 367, 374; **Brown v. Walker**, 161 U. S. 591, 600."

We submit that the hazard of incrimination could be no more substantial or real than with a 65-count criminal information and other ICC investigations pending. The opinion of the Court of Appeals seems to suggest that the hazard was not substantial because petitioner was a corporation president and not part of an inherently suspect group. Although **Albertson**, **Marchetti**, **Grosso**, and **Haynes** related to groups that were inherently suspected of criminal activities, we believe their rationale ought not to be limited to groups. In an appropriate situation, an individual engaged in inherently suspect activities ought to have the same protection.

As recognized in **Marchetti**, **Grosso** and **Haynes**, the effect of petitioner's position here is not an absolute bar to the Government's securing tax revenue from the corporation. Unlike **Albertson**, it is possible that there may

have been other persons associated with E & H Leasing Company who, without the prospect of self-incrimination, could have filed the corporate tax return. In this regard, we believe the opinion of the Court of Appeals was erroneous in suggesting, on the last page, that petitioner "could easily have had some other corporate officer sign the return and file it." Aside from the fact that there was no evidence as to the existence or willingness of any other corporate officer, petitioner was not charged with a failure to have some other corporate officer sign the return; the indictment charged petitioner himself with failing to make the return. Section 7203 of Title 26, United States Code, does not make criminal the failure of one corporate officer to have another sign and file a corporate return. Assuming some other corporate officer were available, would petitioner be criminally responsible if that officer also invoked his Fifth Amendment privilege?

In discussing the necessity of tax laws and the desirability of voluntary disclosure of income, the opinion of the Court of Appeals seemingly relegates the Fifth Amendment privilege to a position of secondary importance. In so doing, we believe the lower Court erroneously imposed improper restrictions on the use of the Fifth Amendment. The privilege against self-incrimination is absolute when properly established; it cannot be weakened by the assertion of another governmental function. In **Garrity v. New Jersey**, 385 U. S. 493, 497, this Court said:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."

In **Spevack v. Klein**, 385 U. S. 511, 515, it was held that no sanction could be imposed upon the assertion of the Fifth Amendment privilege. And in **Simmons v. United**

States, 390 U. S. 377, 394, this Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another."

Nor was the government prohibited in the collection of taxes due. As previously noted, the liability for the tax was that of the corporation and not petitioner. The Internal Revenue Service had numerous remedies and full powers of inspection of corporate records to be able to determine all taxes due from the corporation, without forcing petitioner to incriminate himself. Thus, the Court of Appeals avoided the real issue, we believe, in ruling that "the defendant was not privileged to refuse the production of corporate records nor could he withhold any incriminatory corporate records." Petitioner did not refuse to produce any corporate records, nor did he hinder or prevent the government from examining any such records. Insofar as **Wilson v. United States**, 221 U. S. 361, and **United States v. White**, 322 U. S. 694, cited in the opinion below, hold that the records may not be refused, defendant does not quarrel with reliance upon those cases. However, those cases do not hold that petitioner may be required, at the expense of his Fifth Amendment privilege, to sign documents which would incriminate himself or to testify concerning incriminatory corporate documents which might be produced. Cf. **Mancusi v. DeForte**, 392 U. S. 364.

Petitioner is not objecting to the entire tax procedure, as was the situation in **Sullivan**; instead his objection is directed to his personal involvement in the corporate tax return and to a procedure which would deprive him of his rights under the Fifth Amendment not to be compelled to furnish self-incriminatory evidence. That the government may have already known or had access to public records showing that petitioner was president of E & H Leasing Company should not, as suggested on the last page of the opinion below, make the Fifth Amendment

inapplicable to petitioner. Because the prosecution may be able to prove a fact by some other evidence, petitioner is not estopped from asserting his privilege. To so hold would render the Fifth Amendment a nullity, except where the government has no evidence as to the subject matter. Such a ruling is contrary to the doctrine of the need for corroboration of admissions (see **Opper v. United States**, 348 U. S. 84, 93), for the effect of the holding below would be that where the government has some corroborative proof, a defendant would not be permitted to refuse to make a statement. And it is contrary to **Albertson** (l. c. 81):

> "The judgment as to whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment, with all its uncertainties."

We believe, for all of the foregoing reasons, that petitioner was entitled to invoke the protection of the Fifth Amendment and was not required to file the corporate tax return. To have signed the return could have provided substantial evidence to link him with criminal prosecutions either contemplated by the government or actually pending. The proper application of the Fifth Amendment privilege vitiates his conviction.

We respectfully submit that the Court of Appeals erroneously decided this cause in a way in conflict with the decisions of this Court in **Albertson, Marchetti, Grosso,** and **Haynes.** Furthermore, we suggest that if the Court of Appeals properly applied **Sullivan** to the factual situation here, then this Court should review the broad language of **Sullivan** in the light of these more recent Fifth Amendment cases.

CONCLUSION.

For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

CONCLUSION.

For these reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 19,288

Edward M. Heligman, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[March 5, 1969.]

Before Matthes, Gibson and Lay, Circuit Judges.

Gibson, Circuit Judge.

The defendant Edward M. Heligman was convicted of violating 26 U. S. C., § 7203, which requires, in addition to other obligations, the making (and filing) of income tax returns.[1] This section requires all corporations to file a corporate income tax return; and under 26 U. S. C., § 6062 a corporate return "shall be signed by the president, vice president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act."

[1] Section 7203 in pertinent part states:

"Any person * * * required by this title or by regulations made under authority thereof to make a return * * *, who willfully fails to * * * make such return, * * * at the time or times required by law or regulations, shall * * * be guilty of a misdemeanor * * *."

Defendant was president of the E & H Leasing Company and as president failed to file or cause to be filed corporate income tax returns for the calendar years 1961 and 1962. He was sentenced to one year on each count, the terms to run concurrently.

The facts constituting the offense were admitted and stipulated by the defendant in the trial to the Court,[2] Defendant's only defense was a Fifth Amendment claim that he should not have been called upon to make or file corporate returns since by so doing he might have incriminated himself with respect to potential or pending criminal charges of Interstate Commerce Act violations.

The factual basis for Heligman's Fifth Amendment claim is that on December 4, 1962 a criminal information was filed against him, charging him with 65 violations of the Interstate Commerce Act, committed between October 3, 1960 and April 13, 1962. Pertinent elements of each violation were that Heligman knew the corporation was violating the law and that he knowingly aided the illegal activity. These charges apparently arose out of the operation of related corporations and not the E & H Leasing Company. No charges were filed against the E & H Leasing Company, but Heligman was under investigation.

The legal basis for the Fifth Amendment claim is that the Supreme Court's interpretation of the Fifth Amendment[3] privilege against incrimination in *Albertson v. Subversive Activities Control Board,* 382 U. S. 70 (1965), and in the trilogy of *Marchetti v. United States,* 390 U. S. 39 (1968), *Grosso v. United States,* 390 U. S. 62 (1968) and *Haynes v. United States,* 390 U. S. 85 (1968) is broad

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[2] The Honorable John K. Regan, United States District Judge for the Eastern District of Missouri.

[3] The Fifth Amendment to the United States Constitution in part states:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

enough to excuse defendant from the statutory obligation to file the corporate income tax returns of E & H Leasing Company of which he was president, where by so doing, he might have incriminated himself.

Defendant claims that to have signed the corporate income tax return, in his capacity as corporation president, for the calendar year 1961, while he was violating the law, and to have similarly signed the corporate income tax return for the calendar year 1962, while criminal charges were outstanding against him, (he pleaded guilty to 30 counts of the information on March 18, 1963) would clearly have incriminated him in that it would have supplied proof of his corporate position and by inference would have supplied proof of his knowledge of the unlawful operations of the E & H Leasing Company or related corporations. Defendant, therefore, maintains that with his and the defendant corporation's and related corporations' background of Interstate Commerce violations he had reasonable cause to apprehend danger from the filing of the corporate tax returns, and such filing would have furnished a link in the chain of evidence needed to prosecute him for a federal crime. The defendant does not pinpoint specific inquiries or answers in the corporate return that would be incriminatory but asserts that signing the corporate tax return as president would reveal the fact that he was president of the corporation and as president would know that the corporation was violating the law and that he knowingly and willfully aided and abetted the corporate offense.

The Government considers the matter controlled by *United States v. Sullivan,* 274 U. S. 259 (1927), where a unanimous court in an opinion by Mr. Justice Holmes held that the income tax law applies to illegal gains and that the Fifth Amendment protection does not protect the recipient of illegal gains from prosecution for willful failure to make a return. That Court further held at 263 that

if the return called "for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."

The rationale declared in *Sullivan* was followed by us in *Daly v. United States,* 393 F. 2d 873 (1968), where we held that a taxpayer was not entitled to a blanket Fifth Amendment objection to an inquiry and interrogation by the Internal Revenue Service, and that the taxpayer, "cannot assert the privilege to every question asked by the examiner, most of which are innocuous on their face." We thus left open the question as indicated in *Sullivan* of whether there might be specific questions in the return, or as in *Daly* in the interrogation, the answers to which might be privileged. But the taxpayer is not the final arbiter of the privilege. The privilege must be specifically claimed on a particular question and the matter submitted to the court for its determination as to the validity of the claim.

The defendant here, however, claims a blanket privilege against the mere making or filing of the return. The cases relied on by defendant have held filing or registration statutes invalid that require an individual to disclose a certain status (as a gambler) or a criminal act (illegal possession of firearms or membership in a subversive organization) that would leave him exposed to either a federal or state prosecution.

In *Albertson* the Court held the Subversive Activities Control Act of 1950, 50 U. S. C. § 786, unconstitutional in requiring registration of the Communist party as an organization and of its members as individuals because the registration was inherently incriminatory since the admission of Communist party membership or affiliation "might be used as evidence in or at least supply investigatory leads to a criminal prosecution." (at 78) under various

other anti-subversion statutes. The Court distinguished *Sullivan* by viewing the questions in the income tax return as neutral on their face and directed at the public at large, whereas the registration of subversive organizations was directed at a "highly selective group inherently suspect of criminal activities." (at 79). In *Marchetti* and *Grosso* the Court held the Fifth Amendment privilege against self-incrimination barred an individual's prosecution for violating the federal wagering tax statutes, 26 U. S. C. §§ 4411 and 4412, on the ground "that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." at 48 of 390 U. S. The Court further held in *Marchetti* that the "required records" doctrine of *Shapiro v. United States,* 335 U. S. 1 (1948) could not be utilized to preclude assertion of the constitutional privilege and that *Shapiro* was inapplicable.

In *Haynes,* the Court held the Fifth Amendment privilege against incrimination applicable in defending a charge of possessing an unregistered firearm, holding the interrelated statutory system for the taxation of certain firearms was "apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subject to taxation." (at 87 of 390 U. S.); "that the registration clause of [Title 26 U. S. C.] § 5851 is not properly distinguishable from a conviction under § 5841 for failure to register, and that both offenses must be deemed subject to any constitutional deficiencies arising under the Fifth Amendment from the obligation to register." (at 95); that the registration would be self-incriminatory; and that the registration requirement is directed principally at persons, as noted in *Albertson,* " 'inherently suspect of criminal activities.' " (at 96).

The defendant distinguishes *Sullivan* by pointing out that in *Sullivan* the tax was imposed upon the taxpayer

defendant, whereas here any tax due was a corporate obligation and not a personal one of the defendant. He views his obligation to file the corporate tax return the same as a "registration" in the *Albertson* case. We are not impressed by this argument.

The defendant, as a corporation president, had a statutory obligation to either file or cause to be filed a proper corporate tax return. The affirmative requirements of § 7203 are directed to all taxpayers, corporate and individual, who are subject to filing a return under the tax laws. It is neutral in its application and is not directed against a group "inherently suspect of criminal activities." Corporation presidents and the other corporate officers mentioned in § 6062 are not an inherently suspect group.

It belabors the obvious to point out that the purpose of the tax laws is to raise public funds, that adequate operation of taxing procedures is vital to the well-being of this country, and that the basic purpose of the tax laws is not to punish extraneous crimes but to assess and collect revenue. Offenses for violations of the tax laws are, of course, set up as a necessary enforcement measure. Our income tax system is to a large extent predicated upon the voluntary disclosure of taxable income. The operation of this system is of crucial concern to the nation. The public need for requiring voluntary disclosures of income transcends any personal right to thwart national objectives by allowing an undisclosed self-determination of possible incrimination, thus excusing compliance with the income tax laws. We, therefore, hold that the Fifth Amendment privilege against incrimination does ont extend to defendant's failure to file or cause to be filed the corporate tax returns of E & H Leasing Company.

Furthermore, the defendant was not privileged to refuse the production of corporate records nor could he with-

hold any incriminatory corporate records. These are not personal records and the government has a right to view corporate records for legitimate investigative purposes. *Wilson v. United States,* 221 U. S. 361 (1911) long ago held that the president of a corporation could not refuse to produce corporate records on the ground that they would incriminate him, stating at 384:

> "If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures."

Later the Supreme Court of the United States in *United States v. White,* 322 U. S. 694 (1944) held an officer of a labor union could not refuse to produce union records under a Fifth Amendment claim against self-incrimination, the Court reasoning at 699:

> "But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination."

There is another aspect of defendant's claim which should be mentioned. While we are of the opinion that the Fifth Amendment claim against self-incrimination is not available to the defendant under the facts of this case, it is difficult for us to perceive how the defendant can seriously advance his claim when he could easily have had some other corporate officer sign the return and file it so that actually he was not confronted by any substantial and real hazard of compelled incrimination. See *Marchetti*

at p. 53. Also the information of his position as president of the E & H Leasing Company was readily available to the Government through the office of the Secretary of State of Missouri, who must by law keep a public record of the officers of Missouri corporations. V.A.M.S. § 351.120. Also there are probably many other sources where this information would be available such as occupational licenses and other business reports and filings. In fact defendant admitted in oral argument that the Government knew, at the times under consideration, that he was president of E & H Leasing Company.

We fail to see any substance to the argument that defendant feared self-incrimination by disclosing his corporate position on a tax return when the Government already knew him to be, or had access to public records showing him to be, president of E & H Leasing Company.

Judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1968.

Edward M. Heligman, Appellant,

vs.

United States of America, Appellee.

No. 19,288.

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be and the same is hereby, affirmed.

It is further Ordered by this Court that the defendant in the said District Court, Edward M. Heligman, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

March 5, 1969.

Order entered in accordance with Opinion

/s/ Robert C. Tucker,
Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX C.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1968.

Edward M. Heligman,
Appellant,
vs.
United States of America.
No. 19,288.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for respondent and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

March 26, 1969.

APPENDIX D.

United States Court of Appeals
For the Eighth Circuit.

Edward M. Heligman, Appellant,

vs.

United States of America.

No. 19,288.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 27, 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1307

EDWARD M. HELIGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1-A8) is reported at 407 F.2d 448.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1969 (Pet. A 9). A petition for rehearing was denied on March 27, 1969 (Pet. A 11). The petition for a writ of certiorari was filed on April 24,

1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether petitioner's privilege against self-incrimination excused his failure to file income tax returns for a corporation of which he was president.

STATEMENT

After waiving jury trial, petitioner was convicted by the United States District Court for the Eastern District of Missouri of having wilfully failed to file income tax returns for the years 1961 and 1962 on behalf of the E & H Leasing Company. Petitioner was the president of the corporation and the officer responsible for filing such returns. He was sentenced to concurrent one year terms of imprisonment on each of the two counts of the indictment (R. 1, 85, 87).[1]

Petitioner moved to dismiss the indictment on the grounds that execution and filing of the corporation's tax returns would have compelled him to be a witness against himself and that Section 7203 of the Internal Revenue Code of 1954 was invalid in so far as it required him to file such returns (R. 12). It was stipulated (R. 16) that on December 4, 1962, petitioner was charged by information with criminal violations of the Interstate Commerce Act. The information (R. 37-83) contained sixty-five counts, each of which charged petitioner with aiding and abetting Refriger-

[1] "R." references are to the transcript of record on file in this Court.

ated Food Distributors, Inc., in unauthorized interstate carriage of merchandise on a particular date between October 3, 1960 and April 13, 1962. It alleged (R. 82) that petitioner had previously been convicted of similar offenses on November 17, 1958, and April 4, 1960. On March 29, 1963, petitioner pleaded guilty to thirty counts and was fined $15,000. In a related civil proceeding to enjoin further violations, the district court entered findings (R. 27) that the 1958 and 1960 pleas of guilty had been entered by the E & H Leasing Company "and its president, Edward Heligman, who was in active control and management of the transportation operations of the E & H Leasing Company."

The district court denied the motion.

ARGUMENT

There is no merit to petitioner's contention that the necessity of identifying himself as president of E & H Leasing Co. on its tax returns created a real and substantial danger of self-incrimination (Pet. 10) and of furnishing "substantial evidence to link him with criminal prosecutions either contemplated by the government or actually pending" (Pet. 13). He could readily have procured another corporate officer or attorney to sign and file the return. See *Marchetti* v. *United States*, 390 U.S. 39, 53. Moreover, he had been identified as the corporation's president by his pleas of guilty in previous prosecutions, and, as pointed out by the court of appeals (Pet. A8), not only is such information a matter of public record, but petitioner admitted in the court of appeals that the gov-

ernment at all pertinent times knew he was president of the E and H Leasing Company. Such required information "neither led nor could have led to a discovery of his crime." *Heike* v. *United States*, 227 U.S. 131, 143. The professed hazards were "merely imaginary and unsubstantial." *Marchetti*, *supra*, 390 U.S. at 48.

The cases on which petitioner relies repeatedly distinguish the obligation to file ordinary tax returns as one to which their reasoning does not apply. Thus, the reporting requirements of the income tax laws are wholly neutral, being directed at the public at large. *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79. They are not directed at persons "inherently suspect of criminal activities." *Grosso* v. *United States*, 390 U.S. 62, 68; *Leary* v. *United States*, decided May 19, 1969, slip op. p. 10. Petitioner was not entitled to "draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *United States* v. *Sullivan*, 274 U.S. 259, 264. Indeed, petitioner has never alleged that he actually entertained any fear of self-incrimination in this case. His motion to dismiss was based solely on the stipulated facts.

Finally, there is no merit to petitioner's attempt to distinguish *Sullivan* on the ground that petitioner is not the person liable to tax but is being required to register the corporation (Pet. 9). As noted by the court of appeals (Pet. A7), a corporation officer may not refuse to produce its records on the grounds of self-incrimination. *Wilson* v. *United States*, 221 U.S.

361. His duty extends as well to making validly required reports to the government. In *Baltimore and Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U.S. 612, it was held that corporation officers could validly be required to submit reports showing excessive hours worked by employees even though the officers might be subject to prosecution. The opinion stated (221 U.S. at 623):

> And, with regard to the keeping of suitable records of corporate administration, and the making of reports of corporate action, where these are ordered by the Commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the coroprate obligation and cannot claim a personal privilege in hostility to the requirement. *Wilson* v. *United States, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE, 1969.

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